IN THE

Supreme Court of the United States

No. 76-6921

BIAGGIO CAMPISI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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APPENDIX

SUPREME COURT OF THE UNITED STATES

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BIAGGIO CAMPISI,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, BIAGGIO CAMPISI, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 18, 1976.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, and appears in Appendix A to this brief.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on October 18, 1976. This petition for certiorari is filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Was there a sufficient showing by independent evidence that Biaggo Campisi had joined the conspiracy to permit extra judicial declartions of an alleged co-conspirator into evidence against him; and is not the Third Circuit rule permitting a showing of independent evidence of less than that which is necessary to take the issue to the jury violative of the Confrontation Clause, Due Process Clause, and United States Supreme Court decisions which supervise the federal courts?

2. Was the admission into evidence of an extra judicial declaration by an alleged co-conspirator that "$400.00 rent" was being paid, which erroneously left the impression that it was being paid to the defendant, so ambiguous, as well as crucial and devastating, that the admission of such a hearsay statement against the defendant was violative of the Confrontation Clause, Due Process Clause, and the Supreme Court decisions which supervise the federal courts?

3. Conceding that there was ample evidence that a conspiracy existed, was there sufficient evidence to establish beyond a reasonable doubt that the defendant was a member of that conspiracy; and is not the Third Circuit rule requiring only "slight evidence" to support a jury verdict that the defendant was a member of the conspiracy violative of the Due Process Clause?

STATEMENT OF THE CASE

Biaggio Campisi was indicted along with Thomas DeMarco, Bruce Scrivo, and Charles Cariffe in Count I of indictment 75-24. He and the others were charged with conspiring to violate 18 U. S. C. §892, which makes criminal the making of extortionate extensions of credit. There were no unindicted co-conspirators named in the first count. The second count charged neither the petitioner nor DeMarco.

Only Bruce Scrivo, Charles Cariffe, and Clovetta Cariffe were charged in the Second Count with conspiring to collect extensions of credit by extortionate means. Gerard Festa was named as an unindicted co-conspirator in the second count. Prior to trial, Charles Cariffe was severed, and Clovetta Cariffe pleaded guilty to Count II.

Petitioner, DeMarco, and Scrivo proceeded to trial before the Honorable Frederick B. Lacey on November 3, 1975. On November 7, 1975, the jury convicted petitioner on Count I and Scrivo on both Counts. The jury failed to reach a verdict on the single charge against DeMarco.

Subsequent to the trial, Charles Cariffe pleaded guilty to Count I on November 17, 1975. The retrial of Thomas DeMarco began on January 6, 1976, and resulted in an acquittal on January 9, 1976.

Petitioner brought a motion for a new trial based on evidence adduced at the subsequent trial of Thomas DeMarco. Petitioner's motion was heard and denied on March 8, 1976. On that same date petitioner was sentenced to a three-year prison term on Count I. Scrivo received concurrent two-year prison terms on Count I and II respectively. Charles Cariffe received a two-year prison term when he was sentenced on March 2, 1976. Clovetta Cariffe was sentenced to a two-year probationary term.

On October 18, 1976, the Court of Appeals for the Third Circuit affirmed the judgment.

STATEMENT OF FACTS

Biaggio Campisi was indicted along with Thomas DeMarco, Bruce Scrivo, and Charles Cariffe in Count I of indictment number 75-24. He and the others were charged with conspiring to violate 18 U. S. C. §892, which makes criminal the making of an extortionate extension of credit. The indictment charges that the four defendants (there are no unindicted co-conspirators named in the First Count) conspired with each other, "and with other persons to the grand jury unknown," to "make extortionate extensions of credit as defined by Title 18, United States Code, section 891(6), with respect to which extensions of credit it was the understanding of, [four defendants are named] and the borrower-debtors, at the time of the making of the extensions of credit, that delay in making repayment and failure to make repayment of the extensions of credit by the borrower-debtors could result in the use of violence and other criminal means to cause harm to the person, reputation, and property of said borrower-debtor and others.

"It was part of said conspiracy that Thomas DeMarco and Biaggio Campisi would operate a dice game in Newark, at which they authorized Bruce Scrivo to lend money to the dice players and others through and with the assistance of Charles Cariffe.

"It was further part of said conspiracy that from in or about the month of January, 1972, until the date of the filing of this indictment, Bruce Scrivo and Charles Cariffe made extortionate extensions of credit at various locations in and around Bloomfield Avenue, Newark, and other locations throughout New Jersey."

The trial judge ruled that the government had offered no proof to support the allegations in the last full

paragraph pertaining to street loans. He instructed the jury to disregard evidence submitted in support of that paragraph which alleged "street loans," and struck the paragraph from the indictment. (Tr 273-13 to 277-15).

The second count which did not name petitioner, charged Bruce Scrivo, Charles Cariffe and Clovetta Cariffe as defendants and Gerard Festa was named as a co-conspirator. That count alleged that the defendants and unindicted co-conspirator conspired to use extortionate means (defined by 18 U. S. C. 891) (7) to "collect and attempt to collect extensions of credit by threatening, expressly and implicitly the use of violence and other criminal means to cause harm to the person, reputation and property of the borrower-debtors, their families and other persons, if timely repayments of said extensions of credit were not made.

"It was part of said conspiracy that Bruce Scrivo and Charles Cariffe would make extensions of credit with respect to which it was the understanding of the borrower-debtors, at the time of making of the extensions of credit, that delay in making repayments and failure to make repayment of the extensions of credit by said borrower-debtors could result in the use of violence and other criminal means to cause harm to the person, reputation and property of the borrower-debtors, their families and other persons". It is readily apparent that much of the conduct alleged in the First Count is also alleged as part of a separate conspiracy in the Second Count. Consideration of the portion of the indictment which the trial judge struck re-enforces that conclusion.

The indictment continues, "it was further part of said conspiracy that Charles Cariffe and Gerard Festa . . . would collect and attempt to collect interest of 'vig' payments from the borrower-debtors and would threaten im-

plicitly and explicitly the use of violence and other criminal means if timely repayments of extensions of credit were not made.

"It was further part of said conspiracy that Clovetta Cariffe would maintain records of repayments and failure to make repayments of extensions of credit made by Charles Cariffe and Bruce Scrivo.

"It was further part of said conspiracy that from in or about the month of January, 1972, until the date of the filing of this indictment, the exact dates to the grand jury unknown, Bruce Scrivo received interest or 'vig' payments at Da Vinci's Lounge . . . and elsewhere from his collectors Charles Cariffe and Gerard Festa and others.

"It was further part of said conspiracy that from in or about the month of January, 1972, until the date of the filing of this indictment, the exact dates to the grand jury unknown, Charles Cariffe and Gerard Festa . . . collected and attempted to collect interest or 'vig' payments at Paramount Fashions, 335 Ampere Parkway, Bloomfield, New Jersey; Da Vinci's Lounge, 654 Fourth Street, Newark, New Jersey; Howard Johnson's Restaurant on Route 1 & 18, New Brunswick, New Jersey and elsewhere."

Biaggio Campisi was not a defendant in Count Two. The government's case began with the testimony of Clovetta Cariffe, wife of Charles Cariffe. She had pleaded guilty to the allegations charged against her in Count Two.

She testified that her husband collected loan payments from money put out on the street by other people (Tr 21) among them was the defendant, Bruce Scrivo (Tr 22-13 to 14). The court ruled that this testimony was only applicable to Count Two. (Tr 24-21 to 25-10) She then testified that her husband told her that "Bruce Scrivo had been given the 'okay' and had gone to Andy Gerardo,

had gone to 'the old man' and received permission to loan money at a particular dice game that had started." (Tr 25-18 to 27) Scrivo objected, and the court then struck all the testimony relating to anything more than that "Bruce has been given the okay." (Tr 27-21 to 30-8) She testified that the defendant Scrivo gave Charles Cariffe money to loan out for him, and that together they checked the records to see what money had been repaid. (Tr 30-10 to 24) Mrs. Cariffe described the records of the loans which she kept, and explained that she collected payments in a clothing store which Bruce Scrivo owned. She also explained that her husband loaned money on "the street" as well as at the game. Loans on the street were paid back on a weekly basis while loans at the dice game were paid back the next day. (Tr 67-16 to 24)

She related that one time Gerard Festa took over from her husband and made collections for him. (Tr 73-1 to 21) At one point she described a conversation between her husband and her. The subject matter was one Joey Fulco. She said that her husband related that Joey Fulco was slow paying a loan back. Her husband told her "Bruce has got Joey Fulco scared to death". She said she responded "why would he be afraid? What's he afraid of?" According to Mrs. Cariffe, her husband explained that Bruce Scrivo had told Mr. Fulco that "if he didn't get his payment up he was going to be put in the incinerator out at the back of 'he Branch Brook Lumber Company. He says that's where everybody goes that's slow on their payments." (Tr 74-1 to 17)

Mrs. Cariffe also described a conversation which she witnessed (but could only see through a glass window) between her husband, Bruce Scrivo and one Jerry Rosani. Rosani had apparently borrowed money and was slow on his payments. Rosani never went to the dice game, and

the loan had nothing to do with the dice game. She described this conversation as: "and Charley was—poor Jerry was standing there with his hands and Charley was shaking his finger at him and Bruce was standing there.

"Then Jerry got in his car and left and Bruce got in his car and left and Charley came in. And he said, well, I guess we got Rosani straightened out. I told him we didn't want to hear any of his problems; we all got problems and he'd better get his payment up and make the best of it!" (Tr 77-13 to 78-21)

Finally, she concluded her direct examination by relating that the books used to keep records of the loans were hidden from the government authorities and moved when the government authorities came looking for them. (Tr 87-25 to 90-25) She also said there were some men that her husband and Scrivo knew they would not be able to collect from and those men included the co-conspirator on Count Two, Gerard Festa and one Petey White. (Tr 91-1 to 6)

Mrs. Cariffe at no time mentioned the name Biaggio Campisi, or the name of Thomas DeMarco. She knew nothing about the dice game, or, apparently, about those two defendants in Count One. (Tr 145-1 to 12)

The government proved through Newark Police Officer, Michael Parelli that on April 7, 1973, 27 players were arrested at a dice game in Newark, including Thomas DeMarco, Charles Cariffe, Gerard Festa and Biaggio Campisi (Tr 161-15 to 164-13).

Henry Sotnikoff was a player at the game. He explained that one could either bet with the house or with other players at the game. He indicated that at least one time he had seen Biaggio Campisi taking care of the bets with the house. (Tr 210-9 to 213-19) Rather than

money being used, Mr. Sotnikoff said that cards worth either $50 or $100 were given out. (Tr 214-16 to 24) While Sotnikoff said that he believed that the house took a percentage of the bet, the biggest bets that he heard were man to man rather than against the house. (Tr 216-1 to 217-5) Sotnikoff testified that one Tom Oplanti had borrowed at the game beyond his limit. Sotnikoff gave someone named Charley who, apparently, loaned money at the game, his promise to repay if additional mones were loaned to Oplanti. (Tr 219-15 to 221-9) Oplanti apparently worked at a Howard Johnson,'s, and Sotnikoff, at least one time, saw Gerard Festa and Charley with him at Howard Johnson's. (Tr 233-9 to 234-6) He saw money pass from Tom to Charley, but heard no conversation. (Tr 234-13 to 20) A few times when Ben Perillo, who had also been to the game with them, was there and Sotnikoff saw the same transfer of mony. (Tr 234-23 to 235-6) One time, Sotnikoff picked up some money *from* Charley at a diner across from the stadium and took the money *to* Tom Oplanti. (Tr 236-1 to 14)

Sotnikoff also told the jury that "Charley is always shooting off his mouth and tries to impress us as a big deal." (Tr 238-8 to 16) Sotnikoff also explained that you did not have to bet with the house and that sandwiches and beverages were served without payment as an accommodation to the players. Tr 244-3 to 22) Sotnikoff also indicated that Baggio Campisi and Thomas DeMarco, as well as Gerard Festa and Charley were players at the game. (Tr 246-19 to 247-9)

Gerard Festa was the main witness in the government's case against Biaggio Campisi. Two of his uncorroborated statements formed the basis of virtually the entire case against Biaggio Campisi. Fest testified that DeMarco, Biaggio Campisi, and his son, Petey, were sitting at the

house table taking house bets. He testified that he heard bets of $10,000 and $5,000 while he was there. (Tr 253-7 to 254-3) Festa said that he had borrowed money from both DeMarco and Campisi for very short periods of time at five percent interest. (Tr 254-18 to 255-5) No substantive criminal charges were brought because of these loans, nor could they have been part of the conspiracy charged.

Festa testified—and it was never corroborated in any other testimony—that one night before the game started, DeMarco made a statement that the house could not loan out any more money, and that "the shying would be done by Charley Cariffe for Bruce Scrivo". (Tr 256-10 to 25) Festa also related that one "Harry the Hat" could have been present when the alleged announcement was made by DeMarco. Also present, according to Festa, was Charles Cariffe, Biaggio Campisi, Lenny Pizzi, John Quartuccio, Mitch, Doc, and numerous other players whose name Festa did not recall. (Tr 413-14 to 414-5) Festa then elaborated that what DeMarco said was, "a certain individual had sent orders down that the house—the house could not shy out anymore money and from here on in Charles Cariffe would be shying the money for Bruce Scrivo." (Tr 416-18 to 21) At the subsequent re-trial of DeMarco, Festa testified that the certain individual was one Andy Gerardo. At that trial he said, "Andy Gerardo states, sent word down that the house cannot shy anymore money out, too much money out from here on in Charley Cariffe will be shying out the money for Bruce Scrivo.

"Q. And he mentioned the names and he mentioned Mr. Scrivo's name and he mentioned Mr. Gerardo's name, is that right?

"A. Yes (Tr 79-9 to 16)"[1]

1. TR D stands for the transcript of the trial of Thomas E. DeMarco, which commenced in the Federal District Court in Newark on January 6, 1976.

Festa also alleged that one Lenny Pizzi was also loaning money at the game. Festa had a conversation with Cariffe and Bruce Scrivo in which he alleged that Cariffe yelled at Bruce that "we're paying $400 a week rent up there to shy money out and Pizzi is loaning money out and getting the vig and not paying nothing." Scrivo is, according to Festa, alleged to have answered "alright, I'll take care of that." Thereafter Mr. Festa said that he did not see Mr. Pizzi loaning money at the game. (Tr 257-6 to 258-16)

The jury was left with the unmistakable impression that "the $400 rent" was being paid to Biaggio Campisi and DeMarco, whom the government alleged was running the game. It is the only piece of evidence in the entire case which tends to show Biaggio Campisi had "promoted this venture and made it his own." It is the only evidence adduced by the government to show some benefit (rather than simply loss of interest income) running to Campisi. The trial judge's reaction at the close of the government's case indicates the importance of that testimony as well as illuminating clearly the inference to be drawn from it. On another issue Judge Lacey explained the importance accorded the issue of whether one receives a benefit from the enterprise. In regard to street loans, Judge Lacey asked the U. S. Attorney

> "The Court: So What? Where is the connection of Campisi and DeMarco with that? Any demonstration at all that they got any benefit out of that at all?
>
> Mr. Gregorie: No, your Honor, but —
>
> The Court: Just a minute. I recognize you don't necessarily have to get a benefit but it is one of the indicia of membership, if there is any, such benefit. Is there any proof they got benefit out of the street loans?" (Ar 633-13 to 20)

Judge Lacey applied the same reasoning when denying Campisi's motion at the close of the Government's case and said,

> "There's also testimony to the fact that there was a benefit derived from this specifically in terms of what was labeled '$400 rent.'" (Tr 681-25 to 682-2)

However, at the subsequent trial, it turned out that Festa, and therefore the government, alleged that Andy Gerardo, and not Campisi, was receiving $400 a week for allowing Scrivo and Cariffe to lend out money at the game (TD R3-1 to 9).

At one point, Festa testified that he was privy to a conversation between Cariffe and Scrivo. Cariffe said one "Passaic John" owed $500 and hadn't attended the game in a little while. He recited that Bruce told Cariffe "I don't care what you do, get my money.", but said nothing further. (Tr 271-7 to 272-18) Festa then related incidents of street loans made by Cariffe and Scrivo's money. Counsel objected that this was not part of the conspiracy on Count One, but the court ruled that the evidence went to the second paragraph alleging street loans. He permitted the testimony in, though he later reversed himself and had the testimony stricken after the jury had heard it. (Tr 273-15 to 277-13) Festa testified that Cariffe made street loans to Tommy New Brunswick, Billy Hunter, Jerry Rosani, Benny from New Brunswick, Henry from New Brunswick, Doug from New Brunswick, and Nino, (Tr 278-9 to 22) and contended that several of these people borrowed both at the game and on the street. Tr 279-1 to 5) Festa then described how he became a collector, and various incidents that occurred concerning collection. This evidence did not relate to Count I, under which Biaggio Campisi was indicted. However, the evidence included Festa relating

a conversation where Charles Cariffe called Tommy New Brunswick up and told him that if he did not meet Festa at a particular location, he would break his legs. Tr 282-1 to 15)

Festa alleged that the loans were made in the form of tickets, and the tickets were used rather than money. (Tr 288-3 to 5) However, the police did not find any tickets on the night of the raid. (Tr 288-21 to 23) At the retrial of DeMarco, Festa never mentioned tickets in connection with the loans, but spoke exclusively of money.

Festa also testified that "Harry, the Hat" and someone named "Bananas" had also borrowed money from either the defendant, DeMarco or Campisi. Festa related that "Bananas" had an argument with DeMarco in the presence of all the players who were there. According to the witness, when "Bananas" did not return with the appropriate sum of money, "Mr. DeMarco started screaming: 'I don't care. You're not a new kid on the block. Get the money. I want it here. I want the money. Get the money." (Tr 289-6 to 290-19)

On cross examination, Festa admitted to having participated in literally hundreds of burglaries and to arson and armed robbery. (Tr 292 to 308)

On redirect Festa alleged that prior to the start of the conspiracy, he had borrowed $500 from the defendant, DeMarco at a time when Biaggio Campisi was approximately 8 to 10 feet away and that he repaid $525 the next night. Festa admitted that DeMarco never said anything to him concerning interest. (Tr 458 to 544)

Charles Cariffe's son, Gerard Edward Joseph Cariffe, testified only concerning Count Two. (Tr 553-4 to 9) He corroborated the government's theory that Cariffe was involved in collecting loans and keeping records. He also

indicated that Festa had done some of the collecting. (Tr 545 to 554)

Harry Drazin, an 81 year old man, who admitted to being a crap shooter, testified during the government's case-in-chief. His testimony was limited as applying only to the defendant, Campisi, on the issue of knowledge. The testimony specifically did not apply to any of the other defendants, or to the Second Count. The judge so charged (Tr 588-1 to 590-21), and the government acknowledged that the acts to have been committed by the defendant, Campisi, were not in furtherance of the conspiracy and they did not fall within the ambit of either of the final two paragraphs of the conspiracy charged in Count One of the indictment. (Tr 563 to 582) Drazin then said that during the course of the game, that he borrowed money from Biaggio Campisi up to $500. He said that he paid the money back the next day at five percent. (Tr 585-16 to 587-22)

Bonnie Cariffe, 15 year old daughter of Charles Cariffe, testified only in relation to Count Two. (Tr 606-14 to 25) She testified that she overheard a conversation between her father and Festa, concerning "rehashing" of loans, and described the books in which her father kept records of loans. She collected money from one Michael Angelo, and gave it to her father (Tr 601 to 604-3). In addition, she was also privy to a conversation between Festa and her mother (Clovetta Cariffe), and related that Festa gave her mother money and recorded it on a piece of paper (Tr 604-15 to 23). According to Ms. Craiffe, both Scrivo and her father told her that if the F.B.I. questioned her, she was to tell them nothing (Tr 604-24 to 605-25).

After the government rested, the court denied motions for acquittal, but ruled that the final paragraph of Count One of the indictment which alleged that Scrivo and Cariffe

made extortionate extensions of credit on the street from January 1972 on was unsupported by the evidence. (Tr 629-1 to 682-23)

Only the defendant, DeMarco, called witnesses in his defense. Anthony J. Donatiello admitted to being a player at the crap game. He never saw DeMarco run any activity of the game, exercise any authority in control of the game, and he never heard DeMarco make any announcements with regard to the lending of money at the game. (Tr 699-1 to 14) Donatiello borrowed money occasionally from Campisi which was to be returned the next day without interest. (Tr 699-19 to 701-12) He swore that he was a long time friend of Campisis' and that his only understanding was that the money would be paid within a day or so. He had no fear of any harm if the money was not repaid. (Tr 703-8 to 704-23) (Tr 721-1 to 722-13)

Carmine Visco, also a player at the game, confirmed that he too had obtained interest free loans for a brief period of time both from Thomas DeMarco and Biaggio Campisi. (Tr 728-12 to 730-15) He also swore that on those occasions he never had any understanding that in the event that he did not pay he would be harmed in some way. (Tr 730-22 to 731-1)

Angelo Grosso said that during the time of the conspiracy alleged, he borrowed from Biaggio Campisi several times. He averred that the loans were interest free and that he had absolutely no understanding that in the event he did not pay the money back, some type of harm would come to him or his property or anyone else. (Tr 754-1 to 17)

Frank Bonanno's nickname was "Bananas", and he directly disputed Gerard Festa's testimony. He had never borrowed any money ever from Thomas DeMarco, and

therefore never had any argument with DeMarco about the borrowing of money as Festa alleged. (Tr 769-10 to 771-3)

Frank Albanese was also a player at the game. He never heard Mr. DeMarco make an announcement at the game with regard to lending of money by Charles Cariffe. (Tr 780-19 to 787) On a few occasions he borrowed money (interest free) from Campisi during the time the conspiracy was suppose to have been in operation. He had no understanding that if he did not return the money or pay it back that he would be harmed in some way. (Tr 788-3 to 18)

The final witness was F.B.I. case agent, John Thurston who was called by the defendant, DeMarco.

The court and counsel then discussed how to deal with the last paragraph of the first count of the indictment. The court clarified its ruling that there had been no evidence adduced to tie DeMarco and Campisi into the "street loans", and that while there had been evidence indicating that Cariffe and Scrivo were involved in making loans on the street during the time specified in the paragraph, there was no evidence that such loans were part of the conspiracy among the four charged in Count One. (Tr 818-17 to 825-23)

Judge Lacey then charged the jury. He read the entire indictment including the last paragraph of Count One. He amended the government's theory to have the conspiracy begin with the alleged statement by DeMarco in the Fall of 1972, rather than in January, 1972, as described in the indictment. (Tr 1013-5 to 1014-25) For over thirty (30) pages of the transcript Judge Lacey then reviewed the evidence, and told the jury which testimony applied to which count. (Tr 1035 to 1066)

The jury found Biaggio Campisi guilty on the first count. Campisi brought a motion for a new trial which was argued on March 8, 1976. The basis of the motion was evidence adduced at the subsequent trial of Thomas DeMarco. There, the government proved payment of the $400 rent was to Andy Gerardo, and additionally, indicated that one Iacobussi had rented the premises to one Peter Herman, and not to Campisi, Herman left monthly rental payments at the Quick Stop Restaurant, which was owned by Thomas DeMarco. (Tr 831-14 to 3k-14) The court denied the motion, and sentenced Biaggio Campisi to three (3) years in prison.

Bruce Scrivo was sentenced to a two (2) year prison term on the Frst Count and a two (2) year prison term on the Second Count to run concurrently with his prison term on the Frst Count. Charles Cariffe, who had pleaded guilty, also received a two (2) year prison term.

REASONS FOR GRANTING THE WRIT

I. There was an insufficient showing by independent evidence that Biaggio Campisi was a member of the conspiracy, and therefore the admission of testimony as a co-conspirator's exception of the Hearsay Rule is violative of petitioner's rights under the Confrontation Clause, Due Process Clause, and United States Supreme Court decisions which supervise the Federal courts.

A. The Third Circuit Rule Which Makes Sufficient A Showing By Independent Evidence Which Is Insufficient To Justify Submitting To The Jury The Question Of Defendant's Alleged Guilty Involvement Is In Conflict With The United States Constitution, Decisions Of The United States Supreme Court, And Decisions In Other Circuits.

The basic rule of the Third Circuit concerning the necessary showing by independent evidence of a defendant's involvement with the declarant is set forth in *United States v. Bey*, 437 F.2d 188 (3rd Cir. 1971) and *United States v. Rodriguez*, 491 F.2d 663 (3rd Cir. 1974). The Third Circuit has stated the rule as follows:

> "While it is true that hearsay statements are inadmissible when no independent evidence links the declarant to the defendant, *Glasser vs. United States*, 315 U.S. 60 (1942), the threshold requirement for admissibility is satisfied by presenting a likelihood of an illicit association even though it may later eventuate that the independent evidence proves to be insufficient to justify submitting to the jury the question of defendant's alleged guilty involvement with the declarant." *United States vs. Bey*, supra. 190.

It is beyond dispute that a sufficient showing of independent evidence is necessary to satisfy the requirements for the co-conspirator's exception to the hearsay rule. *Glasser v. United States*, 315 U.S. 60 (1942). In that case the United States Supreme Court held that:

> ". . . such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. [citations omitted] Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence. *Glasser vs. United States*, supra 74-75.

However, the federal courts have split in authority as to the standard or burden to which the necessary showing must rise. Professor Weinstein has written,

> "A number of courts have held that the judge must find *only* that a prima facie case has been established before he is justified in admitting it, while others seems to indicate that additional proof is necessary. These latter courts have, uufortunately, usually failed to articulate the standard they require." 1 Weinstein's Evidence 104-40. (emphasis supplied)

Most of the circuits require a prima facie case. *United States v. Hickey*, 360 F.2d 127, 140 (7th Cir. 1966), *cert. den.* 385 U.S. 928 (1966), *United States v. Vaught*, 485 F.2d 320, 323 (4th Cir. 1973), *United States v. Hoffa*, 349 F.2d 20, 41-42 (6th Cir. 1965); affirmed on other grounds 385 U.S. 293 (1966) *United States v. Morton*, 483 F.2d 573, 576 (8th Cir. 1973); *United States v. Spanos*, 462 F.2d 1012, 1014 (9th Cir. 1972).

However, the Second Circuit has frequently articulated what seems to be a sterner standard. *United States v. Bentvena*, 319 F.2d 916 (2nd Cir. 1964) *cert. den.* sub

nom *Fernandez v. United States,* 375 U.S. 940 (1964). That case required that defendant's participation in a conspiracy be established only by proof, "properly admitted into evidence, of their own words and deeds . . . such independent proof must be substantial and not 'too slight.' *United States v. Bentvena, supra,* 948-949.

In *United States v. Geaney,* 417 F.2d 1116 (2nd Cir. 1969) *cert. den.* 397 U.S. 1028 (1970) the court spoke in terms of requiring the prosecution to establish the declarants and the defendants participation in the conspiracy "by a fair preponderance of the evidence independent of hearsay utterances," again a seemingly higher standard. While this standard seems, at first blush, higher than the requirement of a *prima facie* case, application of the standard has sometimes produced anomalous results. In *United States v. Cafaro,* 455 F.2d 323 (2nd Cir. 1972) *cert. den. sub nom Schulman v. United States,* 406 U.S. 918 (1972), the trial court admitted the hearsay statement of the declarant even though the court dismissed the conspiracy charges against him. Professor Weinstein wrote, "this result is particularly strange since it was the long-standing rule of the Second Circuit that [a motion for a directed verdict of acquittal] be denied if there is 'substantial evidence' to support a finding of defendant's guilt. *United States v. Coblentz,* 453 F.2d 503, 506 (2nd Cir. 1972)." Weinstein, *supra* 801-150. Thus the confusion between "the fair preponderance test," "the substantial evidence test," and the "*prima facie* test" is compounded when the court looks at the standard of proof required by the Third Circuit in *United States v. Bey, supra.*

The United States Supreme Court has indicated, if only by way of dicta, that, "as a preliminary matter there must be substantial independent evidence of the conspiracy, *at least* enough to take the question to the jury.

United States v. Nixon, 418 U.S. 683, fn. 14 (1974) (emphasis supplied). Moreover, there is much comment by scholars which urges that the standard should be even higher than sufficient evidence to take a case to the jury. Professor Weinstein has argued for a much sterner standard. He has written "there are instances where the trial court would be well advised to exclude use of a co-conspirator's statement against an accused on the ground that the connection was not sufficiently proved to admit and yet was sufficiently proved to allow the case to go to the jury. Such a rule may be inconsistent with theory but it represents sound policy since conspiracy prosecutions, particularly when there are large numbers of defendants—some of them clearly guilty—place defendants at the periphery of the conspiracy at a great disadvantage." *Weinstein supra,* 104-43. That is precisely the terrible position in which the petitioner in this case found himself. The evidence against the co-defendant Scrivo was overwhelming. Further, additional prejudice was visited upon the petitioner because of the evidence which came into the case under the proofs in the Second Count, in which Biaggio Campisi was not charged. Those proofs were not only voluminous, but inflammatory. For that reason Professor Weinstein has suggested that the better practice would be to require a very high degree of proof before admitting the statement. He has urged that, "only if the court is itself convinced beyond a reasonable doubt—considering hearsay as well as nonhearsay evidence—of the conspiracy, defendant's membership, and that the statement in furtherance thereof, should it admit." *Weinstein, supra* 104-44.

Some courts have followed Professor Weinstein's suggestion of adhering to a higher standard. *United States v. Bentvena, supra.*

However, there can be no doubt that the Third Circuit rule as enunciated in *United States v. Bey, supra,* provides for the admission of co-conspirators' statements based upon a much lower showing of independent evidence. It is only on such a standard that the co-conspirators' exceptions in the case at bar could have been admitted.[2] Judge Adams put the point in his concurring opinion in *United States v. Rodriguez, supra* 667 fn. 10.

> "Though as a panel member I joined the majority opinion in *Bey*, I was then, and continue to be, troubled by some of the ramifications of that case. . . . For example, if under *Bey*, the jury need not find at least a *prima facie* case of conspiracy on the basis solely of independent evidence, the very 'bootstrapping effect' warned against in *Glasser*, [citation omitted] may occur."

It is urged to this court that Judge Adams' fears are well founded indeed. A review of the trial transcript in this case supports the fears so ably articulated by Professor Weinstein and Judge Adams that an innocent person can be ensnared and convicted by the extensive use of evidence admitted under the co-conspirators exception to the hearsay rule, which deprives him of the right to confront and to cross-examine such evidence.

Perhaps it should be further noted that although this case was tried prior to the effective date of the Federal Rules of Evidence, it is likely that the standard in *United States v. Bey, supra,* does not meet that incorporated in Rule 801 (d) (2) (E). Commenting on that role Professor Weinstein has warned, "any tendency to reduce the

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2. Of course it is urged that even under those standards it was error to admit the statement because there was virtually no independent evidence of any kind to link petitioner to the conspiracy.

trial court's obligation to insure that there was a conspiracy and that the defendant was a part of it before admitting co-conspirator's statements is contrary to the spirit of the rule. It is questionable whether an approach which only requires connection to the conspirators rather than membership in the conspiracy adequately protects a defendant or is an accord with the common-law standard as to membership in the conspiracy which the advisory committee sought to incorporate into Rule 801 (d) (2) (E)." Weinstein, *supra,* 801-149, 150, 151.

Whether the standard enunciated in *United States v. Nixon, supra,* is a Constitutional standard, or simply announced by the court in its supervisory capacity over the federal courts is an open question. And, of course, plurality and concurring opinions have served to keep alive the debate as to which constitutional clause is offended. Indeed, guidance is needed to teach both the federal and state courts the contours of Confrontation Clause requirements, the Due Process Clause requirements, as well as instructing the federal courts as to what standard must be met. Numerous commentators for many years have urged that the court give guidance in these critical areas. Davenport, "The Confrontation Clause And the Co-conspirator Exception In Criminal Prosecutions: A Functional Analysis," 85 *Harv. L. Rev.* 1378 (1972), Levie, "Hearsay and Conspiracy: A Reexamination Of the Co-conspirators Exception To The Hearsay Rule," 52 *Mich. L. Rev.* 1159 (1954). Note, "The Hearsay Exception For Co-conspirators Declarations," 25 *U. Chi. L. Rev.* 530 (1958); Baker, "The Right To Confrontation, The Hearsay Rules, and Due Process—A Proposal For Determining When Hearsay May Be Used In Criminal Trials," 6 *Conn. L. Rev.* 529 (1974), Garland and Snow, "The Co-conspirators Exception To The Hearsay Rule: Procedural Implementation

and Confrontation Clause Requirements," 63 Journal of Criminal Law and Criminology 1 (1970), Graham, "The Right Of Confrontation And The Hearsay Rule: Sir Walter Raleigh Loses Another One," 8 Criminal Law Bulletin 99 (1972), Natali, "*Green*, Dutton and Chambers: Three Cases In Search Of A Theory," 7 Rutgers–Camden Law Journal, 43 (1975).

It is urged that this petition should be granted to enable this court to give much needed guidance to both federal and state courts. Likewise, it is argued that the Confrontation Clause and Due Process Clause require a foundation for independent evidence of a more substantial nature than merely prima facie case but *at least* the latter standard must be met. And finally, it is urged that even if the Constitutional mandate applied to the states be only "prima facie case," the requirement in the federal courts should be more substantial.

B. There Was An Insufficient Showing Of Independent Evidence Which Linked Petitioner To The Conspiracy And It Was Therefore Error To Admit Statements Made By Co-conspirators Against Him.

Taking all of the government's evidence as credible, and drawing all the inferences from it, it is clear that defendant's motions should have been granted. While the government may have proved the existence of a conspiracy to make extortionate extensions of credit at the dice game, there is no evidence that Biaggio Campisi was a member of such a conspiracy. At best the government's evidence proved that Biaggio Campisi sometimes sat at the house table taking house bets. And Festa finally did allege that he was running the game. It is clear that in addition Biaggio Campisi was a player at the game. He was arrested at the April 7, 1973, raid along with 26 others.

In transactions which were not alleged to be part of the conspiracy, Campisi was said to have loaned money to various persons, sometimes interest free and sometimes with interest, for short periods of time. Harry Drazin, who played at the dice game, testified that during the period of the conspiracy, Campisi made loans to him overnight at 5% interest. This was because he would not borrow from anyone who he did not know. The trial judge ruled that this loan was not part of the conspiracy and was admissible in evidence only against Biaggio Campisi and not the other defendants. Curiously, it was admitted on the theory that it was probative as to Campisi's knowledge of the extortionate nature of the loans made within the conspiracy.

Festa's allegations of DeMarco's announcement together with his statement that Scrivo and Cariffe were paying rent for the privilege of making loans at the games comprise almost the entire testimony against Biaggio Campisi.

As a matter of law, there is simply not enough evidence for a jury to base a conclusion that Biaggio Campisi joined the conspiracy. *United States v. Annoreno*, 460 F.2d 1303 (7th Cir. 1972) *cert. den.* 409 U.S. 852 (1972) (as it pertains only to the defendant, Reno); *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974). *Butler* is a model for analysis of the facts in this case.

In *Butler*, 23 defendants were tried on one conspiracy count. The conspiracy was to obtain items from a private storage house (R & M) which housed obsolete or unserviceable air force radio and electronic equipment. The same indictment charged various combinations of the 23 defendants in additional substantive counts. Four of the defendants appealed. The appellant, *Butler*, was convicted under the general conspiracy count and also

for having received a stolen radio. Sergeant Greene, a core-conspirator, acquired a number of radios from the storage facility. After deciding that he personally could not use them, he brought them to the shop where he and Butler worked. He left them there with the understanding that anyone who wanted one could have one.

Butler carried one of the radios to his quarters on the base where he uncrated it, examined it briefly, recrated it, and placed it in his locker. When he was almost immediately reassigned to the Philippines, and left the radio in his locker. The court wrote,

> "This court has often noted that the essence of the crime of conspiracy is an agreement to violate the law. [Citation omitted] While the agreement need not take any particular form, there must at some point be a meeting of the minds in the common design, purpose or objects of the conspiracy. One cannot become a conspirator until he has entered such an agreement . . ."

Appearing as a government witness, Sergeant Greene testified that,

> "Airman Butler, as well as other members of their section, was aware of the arrangement between himseuf and Sargeant Johnson for procuring equipment from R & M. Assuming this knowledge to be correct, mere knowledge of approval or of acquiescene in the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to a conspiracy." (At 1249)

So, in the case at bar, it is obvious that all the government has done, taking the government's case at its absolute best, is to prove Campisi had some knowledge of or acquiesced in the object and purpose of the conspiracy.

And that inference comes only from Festa's unsupported assertion that Campisi, who allegedly was running the game, was present when DeMarco said that in the future, Charles Cariffe would loan out all money on behalf of Bruce Scrivo.

Without that statement, all the government has proven—giving the government the benefit of all credibility questions and every inference—is that Campisi was running a dice game, and sometimes had made usurious loans.

Philip Gregg was also a defendant in *Butler*. He was a clerk at the storage facility. The court reversed his conviction of the conspiracy count (the only count in which he was convicted) citing the same principle of law as it cited in reversing the conviction of Butler. The government had hinged its case on irregularities in the handling of documents connected with the transactions between two core-conspirators and Gregg, and on admissions made to the F.B.I. by Gregg that he suspected that some of the equipment withdrawn by the two sargeant core-conspirators could not be used by their unit and that he knew some of it was being traded to other units. The court assumed that such statements might infer knowledge of a conspiracy but held that they fell short of demonstrating cooperation in its objectives. The court placed emphasis on the fact that the core-conspirator, Sargeant Greene, never identified Mr. Gregg as a co-conspirator or mentioned any manifestation of Gregg's agreement to cooperate in an illegal enterprise. That same glaring omission is present when one reviews the evidence against Biaggio Campisi. The court correctly noted,

> "Secondly, we find no evidence indicating motive for Mr. Gregg's cooperation. No where does it ap-

> pear that he received any of the property withdrawn from R & M, or any other form of compensation or benefit for his assistance. . . . were he in fact involved in any conspiracy his services were evidently gratuitous.
>
> As we observed with respect to Airman Butler, *some manifestation of agreement to cooperate in the methods or ends of a conspiracy is essential for one to become a conspirator. Mere knowledge even of the conspiracy itself, is insufficient.*" (at 1251) (emphasis supplied)

The government here proved no motive for Campisi's cooperation either. Neither was any compensation a benefit demonstrated. Of course, the trial judge and jury may have been misled by Festa's statements about payment of the "400 rent."

In *United States v. Annoreno, supra,* the conviction of one of the defendants, Reno, was reversed. The factors which caused the Court of Appeals to reverse Reno's conviction are applicable to an analysis of this fact pattern. The evidence disclosed that Reno accepted payments which were intended for *Annoreno.* He told the borrowers that he would see that *Annoreno* got the money, but there was nothing in any act or statement by Reno to indicate that he had knowledge of the extortionate nature of the loan. Neither is there anything in any act or statement by Campisi to indicate that he had knowledge of the extortionate nature of the loans contemplated by the conspiracy. That the conspiracy between Scrivo and Cariffe is not disputed by this appellant. But knowledge of the nature of the loans contemplated is totally lacking on the part of Biaggio Campisi.

The fact pattern, especially when analogized to *Annoreno* and *Butler,* makes it clear that there was no independent showing of any kind. The showing did not meet the requirements of *Bey,* the lowest standard; it did not meet the requirements of *United States v. Nixon;* and most assuredly, it did not meet a more stringent requirement which has been suggested as constitutionally necessary or, at least, desireable in the federal courts.

II. Certain hearsay allegations of a crucial and devastating nature should not have been admitted because they were ambiguous and needed clarification that only confrontation could bring.

Festa testified that he was at a conversation between Charles Cariffe and Bruce Scrivo. At that conversation Cariffe is alleged to have complained that one Lenny Pizzi was loaning out money at the crap game and collecting interest. By way of complaining, Cariffe reminded Scrivo that they were paying $400 rent for the privilege of loaning out money at the crap game and Leonard Pizzi was paying nothing. Scrivo is alleged to have told Cariffe that he would take care of it, and Festa said never again saw Leonard Pizzi lending out money at the game.

Although much of the case law speaks in terms of an agency rational as justification for admitting testimony under the co-conspirators exception, in reality, reliability is probably a more important justification. *Dutton v. Evans,* 400 U.S. 74 (1970) Davenport, "The Confrontation Clause and the Co-conspirator Exception In Criminal Prosecutions: A Functional Analysis," *supra,* (1972); Levie, "Hearsay and Conspiracy: A Reexamination Of the Co-conspirator's Exception to the Hearsay Rule," *supra.;* 4 Weinstein's Evidence, *supra,* 801-140. Nothing can destroy notions of reliability quite so thoroughly as when the statement is ambiguous, and the declarant is not subject to cross examination as to what he actually meant.

David S. Davenport has suggested that the problem of ambiguity is an especially dangerous one, and has urged that such a declaration is inadmissible. He pointed to the following hypothetical as an example. The declarant A attempts to bribe L, a state legislator. At the trial of B, a local political boss and alleged co-conspirator with A, the prosecution attempts to introduce the testimony of L's legislative assistant that A approached him and said that he and B hoped to persuade L to vote for a particular bill. A asked the assistant to find out whether L would be interested in a $10,000 campaign contribution. Although the statement falls within the contours of the pendency and furtherance requirements of the co-conspirator's exception, it is clearly unreliable.

> "It may suffer from ambiguity; cross-examination of A might show either that he had not meant to connect B with the bribe attempt or that no bribe had been intended. The statement may suffer from a defect in the declarant A's perception; A may have been mistaken in interpreting his earlier conversation with B as an agreement to bribe L."
>
> Davenport, *supra*, 1387, 88.

Thus, Davenport's functional analysis, of necessity, includes the following rule:

> "A declaration is inadmissible whenever it is either (1) materially ambiguous as to the meaning that would justify its admissibility, or (2) ambiguous in a way that could be crucial or devastating."
>
> Davenport, *supra*, 1402.

Clearly the statement in question is both ambiguous as to the meaning that would justify its admissibility and ambiguous in a way that is crucial and devastating. Had

the trial judge been aware that the payment of rents had no connection to either the defendants DeMarco or Campisi, it is extremely doubtful that such testimony would have been admitted. *Dutton v. Evans, supra* (Marshall J. dissenting) Secondly, there can be little doubt that the testimony was crucial and devastating. The reasons for that are outlined in the Statement of Facts in some detail. A precis of that reasoning will suffice here. The only benefit or stake in the venture for Biaggio Campisi which the prosecution attempted to prove was the hearsay statement concerning the "$400 rent." If the jury believed that Scrivo and Cariffe were paying $400 to Campisi for the privilege of loaning out money at the game, then the jury could certainly have believed that Campisis was part of the overall conspiracy. However, had the jury known that the money was alleged to have been paid to somebody entirely different from Campisi, the inferences to be drawn by the jury shifted dramatically. Suddenly Campisi has no stake in the venture, and derives no benefit from the conspiracy.

The formulation that a statement is inadmissible if ambiguous in a way that could be crucial or devastating is "meant to reflect Justice Stewart's recognition in *Dutton*, that the threat to the confrontation clause values increases directly with the 'crucial' or 'devastating' nature of the hearsay admitted." This led to Davenport's formulation of the corollary to the above rule which is: "a declaration is ambiguous as to the apparent direct implication of the defendant in the criminal activity is a declaration 'ambiguous in a way that could be crucial or devastating.'" Clearly the hearsay statement concerning the payment of rents was exactly such a declaration.

III. Even though the existence of a conspiracy has been established, proof beyond a reasonable doubt—not "slight evidence" is needed to support a jury's finding that a defendant was a member of the conspiracy; although here, the government's proofs failed either test.

Because the United States Court of Appeals for the Third Circuit did not write an opinion, it is difficult to ascertain on what basis petitioner's contention was rejected. The government, in its brief to the Third Circuit, relied upon a rule which states that once a conspiracy's existence has been established, only *slight* evidence is needed to support a jury's finding that the defendant was a member of it. The government cited *United States v. DeLazo*, 497 F.2d 1168, 1170 (3rd Cir. 1974); *United States v. Gimelstob*, 475 F.2d 157, 164 (3rd Cir. 1973), *cert. den.* 414 U.S. 828 reh. *den* 414 U.S. 1068 (1973); *United States v. Kenny*, 462 F.2d 1205, 1226 (3rd Cir. 1972) *cert. den.* 409 U.S. 914 (1972).

To the extent that such a rule permits the government to support a jury verdict of defendant's participation in a conspiracy by proof less than beyond a reasonable doubt, the rule does violence to the very basic constitutional guarantees of the Due Process Clause. It has been said that the Anglo-American system of criminal administration is characterized by two basic rules. The government must prove all of the elements of the criminal charge, and it must prove its case beyond a reasonable doubt. "Both elements are subsumed under the presumption of innocence and both are implied by the federal due process clause . . ." Note, "Constitutionality of Rebuttable Statutory Presumptions" 55 *Columbia L. Rev.* 527, 542 (1955). See also *American Tobacco Company v. United States*, 328 U.S. 781 (1946); *Mortensen v. United States*, 322 U.S. 369. Although it was in another context, the court there pointed out that "the verdict in a criminal case is sustained only where there is 'relevant evidence from which the jury could properly find or infer beyond a reasonable doubt' that the accused is guilty." (at 787 fn 4).

The lack of evidence against petitioner has been analyzed elsewhere and need not be repeated here. *United States v. Annoreno, supra* (as it pertains to the defendant, Reno) and *United States v. Butler, supra,* are illustrative of the proper manner in which evidence should be evaluated to determine whether there was sufficient evidence to support a jury verdict that a defendant was indeed part of a conspiracy where it is clear that the conspiracy has been proved. That analysis is set out in Point I and need not be repeated here.

There is a compelling need for the Supreme Court to guide the lower federal courts in its supervisory capacity as well as to establish the Due Process requirements concerning the quantum of the government proof necessary to support a jury verdict on this one apparently uniquely-treated issue.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Raymond I. Korona
RAYMOND I. KORONA
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 76-1416

UNITED STATES OF AMERICA

v.

THOMAS DE MARCO, BRUCE SCRIVO, CHARLES CARIFFE, CLOVETTA CARIFFE, BIAGGIO CARMISI

Biaggio Campisi, *Appellant*

On Appeal from the United States District Court
for the District of New Jersey
Crim. No. 75-24

Argued October 8, 1976
Before: KALODNER, ADAMS and WEIS, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, namely, whether (1) there was sufficient evidence to prove that appellant was a member of the conspiracy; (2) it was error to admit as a co-conspirator exception to the Hearsay Rule the testimony of Gerard Festa as it related to appellant; (3) the testimony of Harry Drazin should have been excluded; (4) appellant's motion for a new trial on the basis of newly discovered evidence should have been granted; (5) the government proofs under

Count One were at variance with the indictment to such an extent that the substantial rights of appellant were affected; and (6) the government failed to prove an agreement that borrowers should understand that delay in making repayment of loans or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, family or property of the borrowers, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Arthur M. Adams
Circuit Judge

ATTEST:
/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

DATED: OCT. 18, 1976

Certified as a true copy and issued in lieu of a formal mandate on November 9, 1976.

Test: M. Elizabeth Ferguson

Chief Deputy Cluerk, U.S. Court of Appeals
for the Third Circuit